Supreme Court of the United States

October Term, 1955

No. 648

BARGE "ARACUNDA" AND SMITH-BOWLES COMPANY, INC.,
Petitioners,

vs.

AMERICAN SUGAR REFINING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE FIFTH CIRCUIT.

BRIEF FOR PETITIONERS

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CASES AND STATUTES CITED

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BASIS OF JURISDICTION

Jurisdiction of this Court is asserted under the Laws of the United States, and more particularly under Section 240a of the Judicial Code, as amended. (U.S.C.A., Title 28, Section 347a.).

STATEMENT OF CASE

On January 6, 1943, the American Sugar Refining Company filed its libel in rem against the Barge "Anaconda" and in personam against Smith-Rowland Company, Inc., its owners, for an alleged breach of charter-party (R. 21-22).

The charter-party on which the libel was based contained a provision for arbitration in Paragraph 15 thereof (R. 36), the relevant portion of which provides:

> "Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration at the final place of discharge unless the parties hereto otherwise agree pursuant to the provisions of the United States Arbitration Act (Title 9, of U. S. C., Chapter 213 of the Act of Feb. 12, 1925, 43 Stat. 833) except that the provisions of Section 8 thereof shall not apply to any arbitration hereunder."

Section 8 of the United States Arbitration Act referred to in Paragraph 15 of the charter-party provides:

> "If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain judisdiction to enter its decree upon the award."

Smith-Rowland Company, Inc. appeared specially and excepted to the jurisdiction of the Court on the grounds: that the charter-party on which the libel was based contained a provision for arbitration pursuant to the United States Arbitration Act, Title 9, U.S.C.A.; and that the parties having provided that the provisions of Section 8 should not apply to any arbitration thereunder, thereby agreed that the benefits of Section 8 should not be available to the parties; that Section 8 being the sole basis for the filing of the libel and the issuance of the attachment thereunder, in view of the adoption by the parties of the Arbitration Act, the elimination of Section 8 from their agreement left no

basis for invoking the jurisdiction of the Court by this procedure. (R. 10-12).

The District Court treated the special appearance and exceptions as a motion to dismiss and ordered the release of the barge from attachment on the ground that the libel was not properly filed because of the agreement of the parties contained in Paragraph 15 of the charter-party. (R. 30-31).

The opinion and judgment of the Circuit Court of Appeals reversed the trial court on the ground that the agreement of the parties as construed by the trial court was against public policy as an attempt to oust the Court of part of its jurisdiction. (R. 48-52).

American Sugar Refining Company vs. *Barge "Anaconda" and Smith-Rowland Company, Inc.*, 48 Fed. Supp. 385.

SPECIFICATION OF ASSIGNED ERRORS

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court on the ground that Paragraph 15 of the charter-party, as interpreted by the trial court, was invalid as against public policy in that it tended to oust the Court of jurisdiction.

2. The Circuit Court of Appeals erred in giving a different construction from that given by the District Court to Paragraph 15 of the charter-party. (R. 51).

OUTLINE OF ARGUMENT

Petitioners submit the following points of their argument: (1) By adopting the United States Arbitration Act in Paragraph 15 of their charter-party but providing that Section 8 thereof should not apply to any arbitration thereunder, the parties intended to agree

that pending and in the course of any arbitration that might be called for, the vessel which is the subject of the charter-party should not be libeled or seized under process of attachment; (2) An agreement in a war-time charter-party for arbitration of disputes thereunder pursuant to the United States Arbitration Act is not invalid as against public policy because it provides that pending and in the course of such arbitration the vessel which is subject of the charter-party shall not be libeled or seized under process of attachment; (3) The agreement of the parties being valid and enforceable and in pursuance of a war-time public policy, the decision of the Circuit Court of Appeals reversing the judgment of the District Court which held the parties to their agreement, was erroneous and should be reversed.

POINT I

By adopting the United States Arbitration Act in paragraph 15 of their Charter-Party but providing that Section 8 thereof should not apply to any arbitration thereunder, the parties intended to agree that pending and in the course of any arbitration the vessel which is the subject of the Charter-Party should not be libeled or seized under process of attachment.

Section 8 of the Arbitration Act preserves to an aggrieved party certain benefits provided by admiralty practice that would not normally be contemplated by parties in entering a binding and irrevocable agreement to arbitrate such as is provided by the Arbitration Act.

This Honorable Court, speaking through Mr. Chief Justice Hughes, has interpreted Section 8 as follows:

> "The intent of Section 8 is to provide for enforcement of the agreement for arbitration without depriving the aggrieved party of his right under the admiralty practice to proceed against the 'vessel or other property' belonging to the other party to the agreement."

Marine Transit Corp. vs. *Dreyfus,* 1932, 284 U.S. 263 (at page 275); 52 S. Ct. 166; 76 L. Ed. 282.

A further amplification of this interpretation may be found in two opinions of the United States District Court for the Southern District of New York, speaking through Judge Patterson:

> "The purpose and intent of Section 8, 9 U.S.C.A., Sec. 8 is to allow an aggrieved party the benefit of security obtained by attachment; to achieve this end the arbitration is made a phase of the suit in admiralty."

The Sydfold, 25 Fed. Supp. 662 (at page 663).

> "Under this Section libel and seizure of a vessel or other property may be the initial step in a proceeding to enforce an agreement for arbitration."

The Belize, 25 Fed. Supp. 663 (at page 665).

It is therefore clear, as well from the wording of Section 8 as from the judicial interpretations thereof that the benefit it seeks to provide, or preserve, is the benefit of the security obtained from libel and attachment of a vessel. It was this benefit, then, that the parties agreed to forego in regard to any arbitration that might be called for under Paragraph 15 of their charter-party. That the parties intended to enter a binding agreement to arbitrate their disputes is likewise clear from the detailed provision made in Paragraph 15 for the appointment of arbitrators, the manner of calling for arbitration, notice and place of arbitra-

tion; and method of enforcing award through the courts.* (R. 36).

There was a definite reason for the parties making such a contract. This was a War Shipping Administration form of charter-party (R. 35-36) prepared by an agency of the government to serve its needs in a time of war. Because of the scarcity of shipping and the policy of the government to keep as many vessels in service as possible, it was thought expedient to provide in such charter-party that in the event differences arose, the parties would resort to arbitration before litigation, and further, that if it became necessary to call for an arbitration because of such differences, the vessel, or barge in this case, should not face seizure and attachment, as is allowed under Section 8 of the 1925

* "Fifteenth. Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration at the final place of discharge unless the parties hereto otherwise agree pursuant to the provisions of the United States Arbitration Act (Title 9 of U.S.C., Chapter 213 of the Act of Feb. 12, 1925, 43 Stat. 833) except that the provisions of Section 8 thereof shall not apply to any arbitration hereunder. The decision of any two of the three on any point or points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the dispute of differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person, with precisely the same force and effect as if said second arbitrator had been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either arbitrator may apply to a Judge of any Court of maritime jurisdiction in the city above mentioned for the appointment of a third arbitrator, and the appointment of such arbitrator by such Judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators. Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this Charter for hearing and determination. Awards made in pursuance to this Clause may include costs, including a reasonable allowance for attorney's fees, and judgment may be entered upon any award made hereunder in any Court having jurisdiction in the premises."

Arbitration Act, U.S.C.A., Title 9, pending their settlement by this procedure—at least not until there was a final award of arbitration which must be enforced through the processes of the courts.

POINT II

An agreement in a war-time Charter-Party for arbitration of disputes thereunder pursuant to the United States Arbitration Act is not invalid as against public policy because it provides that pending and in the course of such arbitration the vessel which is subject of the Charter-Party shall not be libeled or seized under process of attachment.

The right of the parties to waive the benefits of Section 8 has not been questioned, and in fact has been established by the Supreme Court in the case of *Shutte* vs. *Thompson*, 82 U. S. 151, 21 L. Ed. 123. At page 159 of the official report the Court said:

> "A party may waive any provision either of a contract or of a statute intended for his benefit."

It is a policy of the United States, as established by Congressional action, to recognize as valid, irrevocable and enforceable, executory agreements to arbitrate (Title 9, U.S.C.A., Sec. 2), and in establishing such policy, Congress rejected the outmoded theory that such agreements tended to "oust courts of their jurisdiction".

The history and developments of this statutory policy is traced by Justice Frank of the Circuit Court of Appeals for the Second Circuit in the case of *Kulukundis Shipping Co.* vs. *Amtorg Trading Corp.*, 126 F.

(2d) 978. At page 983 of this opinion, the Court said, speaking of agreements to arbitrate:

> ". . . . it became fashionable in the middle of the Eighteenth Century to say that such agreements were against public policy because they 'oust the jurisdiction' of the courts. But that was a quaint explanation inasmuch as an award, under an arbitration agreement, enforced both at law and in equity, was no less an ouster: and the same was true of releases and covenants not to sue, which were given full effect."

The Court continued on page 985:

> "The United States Arbitration Act of 1925 was sustained as constitutional in its application to cases arising in admiralty. *Marine Transit Corp.* v. *Dreyfus*, 1932, 284 U. S. 263, 52 S. Ct. 166, 76 L. Ed. 516. The purpose of that Act was deliberately to alter the judicial atmosphere previously existing. The report of the House Committee stated, in part: 'Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An Arbitration agreement is placed upon the same footing as other contracts, where it belongs. * * * The need for the law arises from an anachronism of our American Law. Some Centuries ago, because of the jealousy of the English Courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American Courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. The bill declares simply that such

agreements for arbitration shall be enforced, and provides a procedure in the Federal Courts for their enforcement. * * * It is particularly appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable."

"In the light of the clear intention of Congress, it is our obligation to shake off the old judicial hostility to arbitration. Accordingly, in a case like this, involving the Federal Act, we should not follow English or other decisions which have narrowly construed the terms of arbitration agreements or arbitration statutes."

From this interpretation and from the Act itself, we must conclude that it is now a public policy in this country to enforce executory agreements to arbitrate according to their terms. It cannot be said, in consonance with this broad policy, that if one of the terms be that seizure and attachment of a vessel will not be sought pending the arbitration, such term is invalid and un-enforceable.

Petitioners have not repudiated their agreement to arbitrate, and there is no provocation for respondent seeking the aid of the Court's processes at this point to secure the enforcement of such agreement. If an award had been obtained or the agreement had been repudiated by petitioners, perhaps libel and attachment of the barge would have been in order; but if respondent is permitted to use the processes of the Court now, to seize and attach the barge, it will be doing violence to the spirit and purpose of the Arbitration Act as well as to establish principles of equity, by enlist ng the aid of the Court to circumvent a valid contract, a contract not

to seize and attach the barge pending or in the course of arbitration proceedings.

CONCLUSION

Recognizing the principle that Courts will not construe an arbitration agreement as ousting them of their jurisdiction unless such construction is inevitable (*American Guaranty Company* v. *Caldwell*, 72 F. 2d 209) and holding that a contract which ousted the jurisdiction of a Court of admiralty to the extent that it prevented the filing of a libel in rem would be invalid, the Circuit Court of Appeals proceeded to give a strained and artificial construction to the contract of the parties here, in order to avoid holding that contract invalid.

Under the same principle the Circuit Court of Appeals could have found that the contract was valid by giving it a construction that would have been in harmony with the obvious intention of the parties in contracting as they did under existing circumstances. It could have found that the parties did not intend to oust the Court of its in rem jurisdiction, but that they merely intended to provide that the in rem process of the Court should not be available pending and during the course of the non-judicial proceeding, referred to as arbitration.

We respectfully submit for the reasons stated in the brief that the Judgment of the Circuit Court of Appeals of the Fifth Circuit should be reversed, and that the Judgment of the United States District Court for the Southern District of Florida, Miami Division, should be affirmed.

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